

To: Commissioners Downey, Knox, Scott and Swanson
From: Chairman Getman
Date: October 26, 2001
Re: Commission planning objectives for calendar year 2002

Review of 2001 planning objectives

Our planning objectives for the year 2001 were derailed somewhat by the voters' passage of Proposition 34 in November 2000. We had anticipated devoting significant staff resources in 2001 to a major review of the campaign reporting rules. Instead of reviewing our prior rules, however, our resources were redirected toward revising the rules to accommodate the substantive changes made by Proposition 34. In so doing, we put into effect many of the strategies developed for the campaign reporting simplification project. The result has been heightened scrutiny of the statutory basis for each disclosure rule enacted or revised during the course of the year.

We discussed among executive staff¹ whether it would be feasible to return to the campaign reporting project in 2002. The consensus was that it is not. Although we believe that the public and the regulated community would benefit from a thorough review by the Commission and staff of the campaign reporting rules, it would be unfair to candidates and treasurers to propose new reporting rules so soon after implementing the Proposition 34 changes. Moreover, our staff needs more time to observe how election campaigns are run under Proposition 34, and how the new electronic filing requirements of SB 34 work, before proposing substantive changes in the reporting scheme.

Our other planning objectives for 2001 were largely accomplished. Our Public Education Unit was put into full operation and has achieved great success in improving our educational efforts. Our outreach efforts continued and increased, especially in the area of conflicts of interest, where staff conducted numerous training sessions at all levels of government. We expanded and improved our expedited enforcement programs for late contribution reports, major donor reports and statements of economic interests. Our Enforcement Division devoted significant resources to these proactive programs as well

¹ Commissioner Downey participated in the discussions that led to this memo, but has not reviewed its contents.

as proactive investigations leading to successful civil prosecutions for concealment of the true source of campaign contributions. The Enforcement Division did not complete work on an “enforcement priorities plan,” however, but instead postponed that work for reasons discussed further below.

Proposals for calendar year 2002

Our proposed objectives for next year are relatively modest in scope. This reflects anticipated budget cuts and resulting staff reductions, and the necessity of devoting significant staff time in all divisions, on an ongoing basis throughout the year, to accommodate the myriad issues expected to arise as candidates run for office under the new Proposition 34 rules.

Given these budgetary and workload restrictions, we propose the Commission choose one of the following for next year: (1) review of the Enforcement Division’s prosecution and fining policies, or (2) review of the Commission’s role in ensuring proper preparation of agency conflict-of-interest codes, and timely filing of employees’ statements of economic interests.

1. Enforcement policy review

In the course of preparing an enforcement plan, the division reviewed a number of past efforts to identify enforcement priorities and fine-setting policies. One such effort culminated in a July 3, 1989, memorandum to the Commission, a copy of which is attached. Many, if not most, of the statements made in that memorandum hold true today. It is unclear whether a renewed effort by Enforcement to draft a new statement of principles would add enough to that earlier effort to justify the use of limited staff resources. The consensus among executive staff was that simply drafting another such report, subject to Commission review, would not accomplish our goal of understanding and ensuring the consistency of the many policy decisions that underlie enforcement decisions.

Achieving Commission consensus on the content of an enforcement plan is most likely to happen if it is developed with the Commission during the monthly meetings. This method also has the advantage of allowing for public input.

Our proposal would be to schedule time on the agenda for bi-monthly enforcement policy discussions, with each one focusing on a single substantive area, e.g. laundering, conflicts of interest and reporting violations. During those discussions, the staff and Commission would review the elements of a violation; whether our enforcement in this area would benefit from changes in our regulations or advice; the Commission’s past treatment of similar violations; the factors weighed in deciding whether to prosecute and if so, whether to proceed administratively or civilly; and the appropriate fine level, including a discussion of mitigating and aggravating factors that should be considered for each type of violation.

The goal of each bi-monthly discussion would be to emerge with a statement of Commission policy with respect to those types of violations, with the understanding that staff must continue to have great flexibility and discretion in dealing with the differences in individual cases. Implementation would follow in accordance with a schedule approved by the Commission at the bi-monthly discussions.

2. Conflict-of-interest codes/statements of economic interests

The Political Reform Act requires many public officials to disclose personal financial holdings that may be affected by their official duties. It does so through two vehicles: adoption of agency conflict-of-interest codes, and mandatory filing of individual statements of economic interest.

The Act requires every state and local agency in California to adopt a conflict-of-interest code. Most of those codes currently are based on a “model code” contained in Commission regulations. All codes are subject to biennial review and amendment for changed circumstances and must be approved by a “code-reviewing body.” The Commission serves as the code-reviewing body for all state and multi-county agencies, encompassing approximately 1,000 codes. (County boards of supervisors and city councils generally serve as the code-reviewing bodies for approximately 6,000 local agencies.)

We estimate that approximately 100,000 state and local officials and employees file statements of economic interest each year. Certain high-level state and local officials are required to file statements of economic interests; these officials are listed in Government Code section 87200 and include officials holding statewide elective office; members of the Legislature and certain key state commissions; judicial officers; and top county and city officials. Generally speaking, these individuals file statements when they become candidates and/or assume office, and file updated statements annually. Officials listed in section 87200 are subject to the most extensive disclosure requirements under the Act.

In addition, each agency conflict-of-interest code designates which employees and consultants within the agency must file statements of economic interests. These individuals may be required to make only limited disclosures of their financial interests, depending on their duties. Agencies are prohibited from requiring more disclosure than is necessary to comply with the Act. See In re Alperin (1976) 3 FPPC Ops. 77; Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259.

Most statements of economic interests are not filed initially with the FPPC, but instead are filed directly with the state or local official’s agency. The FPPC reviews and retains approximately 20,000 statements of economic interests filed each year by the officials listed in Government Code section 87200, designated employees of the Senate and Assembly, members appointed to state boards and commissions, state department heads, and employees of certain multi-county agencies.

Statements of economic interest do not reveal whether an official actually has a conflict of interest. Some common sources of potential conflict – e.g., one’s personal residence – may not be required to be disclosed on the form. Moreover, the form requires disclosure only of financial interests held in the preceding year, while our conflict laws also look to the official’s current and future financial interests. Nonetheless, every public official in this state is prohibited from making, participating in or influencing a government decision that has a reasonably foreseeable material financial effect on his or her personal financial interests, regardless of whether the individual is required to file a statement of economic interests or to disclose the particular financial interest that is affected.

This disclosure regimen is described more fully in a new publication from our Public Education Unit, entitled “Your Duty to File: A Basic Overview of State Economic Disclosure Law and Reporting Requirements for Public Officials.”

From its inception, the conflict disclosure scheme was intended to be decentralized. Section 87301 of the Act states:

It is the policy of this act that Conflict-of-interest codes shall be formulated at the most decentralized level possible, but without precluding intra-departmental review....

The public scrutiny given to this decentralized disclosure regimen in recent months has caused us to begin an internal review of the Commission’s responsibilities and procedures with respect to conflict-of-interest codes and statements of economic interests. Our staff also has increased its efforts to educate the public, the press and state agency officials on these issues.

Our initial internal review has identified a number of areas where the Commission might consider steps to improve and strengthen our role in this conflict/disclosure regimen. Some of the areas identified so far include:

- Consideration of whether agency conflict codes adequately detail those positions requiring disclosure. In its early years, the Commission determined that many agency codes were too broad; this led to adoption of a model code. The Commission may want to review how the model code is being applied by agencies, and whether other steps can be taken to ensure that conflict codes are adequately tailored to the specific disclosure needs of each agency.
- Consideration of whether Commission staff’s review of agency codes is adequate, or whether further guidance is needed on factors to look for in reviewing codes.
- Consideration of whether additional resources are needed to ensure adequate review of all state agency codes.
- Consideration of the role state personnel agencies could play in helping determine whether certain job classifications should be designated for disclosure, and if so, the amount of disclosure that should be required for each classification.

- Consideration of Commission staff's training program for filing officers/ethics officials in state agencies. The Commission may want to review whether we have and/or utilize sufficient resources to adequately train state agency staff on these matters, and whether further incentives are needed to make sure agencies adequately perform the duties required of them by the Act.

Recommendation

Both proposals for next year are worthy of Commission review. In an ideal world, we would undertake both. However, diminished staff resources and increased pressures from Proposition 34 implementation make it impossible for staff to accomplish both policy reviews and still perform the other duties required of this agency.

The Executive staff expressed a preference for proceeding with the conflict-of-interest code review. Ultimately, the Commission must make that call, weighing such factors as the relative importance of each proposal to the public, their relative impact on staff resources, and any other factors that may affect our ability to conduct and complete a thorough, fair and unbiased policy review.